Supreme Court, U.S.
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No. 94-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SIDNEY J. BROWN, *et al.*,

Petitioners,

v.

RESOLUTION TRUST CORPORATION, *et al.*,

Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Resolution Trust Corporation can circumvent explicit statutory limitations on its powers imposed by Congress in the Resolution Trust Corporation's own enabling legislation by promulgating regulations which eliminate those limitations?

Whether the federal courts have jurisdiction to enjoin the Resolution Trust Corporation from exceeding specific statutory limitations on its powers under 12 U.S.C. §1441a(f), "Limitations on certain Corporation activities," where such violations have resulted in the deprivation of a citizen's Constitutional rights?

Whether the Resolution Trust Corporation's general power to transfer assets immunizes the Resolution Trust Corporation from violating specific limitations on its powers imposed by Congress and the Constitution?

PARTIES TO THE PROCEEDING SOUGHT TO BE REVIEWED

This petition seeks review of an unpublished per curiam decision of the United States Court of Appeals for the Fourth Circuit. The parties to that proceeding were:

Plaintiffs-Appellants:

Sidney J. Brown; Saul H. Bernstein; Sidney J. Brown and Saul H. Bernstein, as the General Partners of Nattchase Associates Limited Partnership on behalf of the Limited Partners Stuart G. Brown, Frederic K. Wine, Bradley S. Bernstein and MDB Investments Limited Partnership; Nattchase Associates Limited Partnership; Mid City Redevelopment Corporation.[1]

Defendants-Appellees:

Resolution Trust Corporation; San Jacinto Savings Association, F.A.; Sajacito, Inc.; Southmark Corporation; CMF Loudoun, L.P., c/o Carl M. Freeman Associates, Inc.; Carl M. Freeman; Robert E. Sevila, Trustee.

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[1] Mid City Redevelopment Corporation is a stand-alone company and has no parent companies or subsidiaries.

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OPINION BELOW

Review is sought of an unpublished per curiam decision by the U.S. Court of Appeals for the Fourth Circuit, Brown, et al. v. Resolution Trust Corporation, et al., Docket Nos. 93-2594, 94-1104 (4th Cir. July 25, 1994). The full text of the decision is set out in Appendix A.

STATEMENT OF JURISDICTION

A panel of the U.S. Court of Appeals for the Fourth Circuit filed the opinion which is the subject of this petition on July 25, 1994. The case was argued before a three judge panel consisting of Judges Murnaghan, Wilkins and Williams on June 10, 1994.

The U.S. Court of Appeals for the Fourth Circuit denied a petition for rehearing and a suggestion for rehearing en banc on August 19, 1994.

This petition is filed within 90 days of the Fourth Circuit's denial of rehearing. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The principal statutes involved in this case are the Financial Institution Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. §1441a, the relevant portions of which are set out in Appendix E, and 12 U.S.C. §1821(j), which is set out in Appendix F. The regulation involved is 12 C.F.R. §1620 which is set out in Appendix G.

STATEMENT OF THE CASE

I. The Nature of the Case

A. Introduction

This petition arises from actions by Defendant/Appellee Resolution Trust Corporation ("RTC") that intentionally denied Plaintiffs/Appellants Sidney J. Brown, et al. ("Brown")[2] the right to bid on a note secured by property which he already owned and in which he had invested over $20 million. When challenged, the RTC claimed to be immune from the authority of the federal courts to correct the RTC's abuses. The central legal issue presented by this petition is whether the general power to transfer assets immunizes the RTC from the courts' injunctive powers when the RTC has exceeded explicit limitations on its authority under a statute entitled "Limitations on certain Corporation activities," 12 U.S.C. §1441a(f), and in the process has violated the United States Constitution.

The RTC's violation of its charter and the lower courts' failure to restrain the RTC's excesses places every citizen's rights at risk. If the RTC is actually immune from the courts and its powers unbounded, then the RTC is free to violate any law. Indeed, before the District Court, the RTC implied that it could even exclude minorities from bidding without interference from the federal courts. This,

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[2] "Brown" refers to all Plaintiffs/Appellants. For purposes of clarity, the names of the individual Plaintiffs/Appellants will be used where appropriate.

of course, is a power not even the United States enjoys as sovereign.

B. Facts

On June 20, 1988, Plaintiff/Appellant Nattchase Associates Limited Partnership ("Nattchase") purchased from Defendant/Appellee Sajacito properties in Loudoun County, Virginia known as "Nattak" (72 acres) and "Steeplechase" (250 acres) (collectively, the "Properties") for a price of $45,000,000. Nattchase paid $9,000,000 at settlement, plus closing costs, and financed the balance of the purchase price by a $36,000,000 deferred purchase money note and deed of trust provided by Sajacito, which was wholly owned by Defendant/Appellee San Jacinto, which in turn was owned by Defendant/Appellee Southmark. None of these entities ever advanced any monies to Brown. Nattchase has paid a total of $14,700,000 in principal and interest, $1,400,000 in real estate taxes and at least $6,000,000 to develop the Properties, for a total out-of-pocket investment of over $20,000,000.

The RTC assumed control over and became responsible for San Jacinto as a failed institution and succeeded to the interest of San Jacinto, which was assigned Nattchase's deed of trust and note by Sajacito. Nattchase failed to make certain principal and interest payments on its note as a result of the depression in the commercial real estate market during the past five years, and also as a result of actions by Southmark, Sajacito and/or San Jacinto that prevented the intended development of the Property.

The RTC "packaged" the Nattchase note for sale in a "pool" with two other notes that were unrelated to the Properties owned by Nattchase and as to which Nattchase had no legal or financial relationship. The bidding package offered by the RTC barred Nattchase and its principals or affiliates from bidding on any of the notes in the pool on the ground that Nattchase was the principal on the note secured by the Properties.

The RTC proceeded to sell the "package" of notes to Defendant/Appellee CMF and/or Defendant/Appellee Carl M. Freeman ("Freeman") for a price of $14,000,000, of which approximately $5,000,000 is allocable to the Properties. CMF and/or Freeman refused to negotiate a settlement with Nattchase and immediately moved to foreclose on the Properties. The RTC's exclusion of Brown from the bidding process effectively took from Brown his substantial investment in the Properties. The RTC sold the note for a fraction of the amount which would have been offered by Nattchase if allowed to bid at a time when the RTC knew or should have known that CMF and/or Freeman or any other purchaser planned to foreclose on the Properties.

By letter dated August 18, 1993, Nattchase formally objected to the RTC's illegal and unconstitutional actions in refusing to allow Nattchase or its principals to bid on the Properties and requested that the RTC set aside the sale and re-advertise for bids. The RTC responded by letter dated September 8, 1993, stating that "[a]ny further issues" must be raised with the purchasers of the note, i.e., CMF and/or Freeman and that the RTC "no longer maintains any right, title, or interest in the loan."

II. Course of the Proceedings Below

As discussed more fully below, 12 U.S.C. §1441a(f) authorizes the RTC to exclude prospective bidders which fall into one of four narrowly defined categories. Brown falls into none of them. Yet, the RTC excluded Brown from bidding on the note secured by the Properties. From these central facts arise causes of action for equitable relief enjoining the RTC from acting illegally and unconstitutionally, declaratory relief declaring the RTC's regulations and actions to be illegal and unconstitutional and monetary relief compensating Brown for his damages and lost investment opportunities.

On November 19, 1993, Brown filed his Complaint in the U.S. District Court for the Eastern District of Virginia seeking injunctive relief, declaratory judgments and monetary and punitive damages, and also filed a motion for a temporary restraining order and preliminary injunction.[3] On November 19, 1993, the same day that Brown's Complaint was filed, the parties appeared before the U.S. District Court for the Eastern District of Virginia for a hearing on Brown's application for a TRO. In its order of November 19, 1993, the District Court denied Brown's application for a TRO and preliminary injunction and, although the District Court recognized the continued viability of certain

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[3] Specifically, Brown sought an injunction which would: 1) enjoin the foreclosure sale of the Properties scheduled for November 22, 1993; 2) set aside the sale of the note to CMF and/or Freeman; and 3) require the RTC to resolicit bids on the note and allow Brown to participate upon the same terms as the other bidders. Brown did not seek to be placed in a better position than the other prospective bidders.

of Brown's causes of action, it dismissed Brown's complaint with prejudice.

On December 14, 1993, Brown filed a motion to vacate or modify the District Court's order. Brown asserted that he had pled causes of action for which relief could be granted, that he had no administrative remedies or that any such remedies had been denied or exhausted, and that the District Court had erred as a matter of law in denying Brown's motion for a temporary restraining order and preliminary injunction. Brown also asserted that the practical effect of dismissing with prejudice his action was to preclude Brown from pursuing the very same claims which the District Court and the RTC had recognized were still viable.

Although the District Court again recognized that Brown did in fact have viable claims against the RTC, on December 21, 1993, the District Court inexplicably denied Brown's motion in all respects and let stand its order dismissing with prejudice all of Brown's claims.

On December 17, 1993, Brown filed a timely notice of appeal from the District Court's order of November 19, 1993. On January 19, 1994, Brown filed a timely notice of appeal from the District Court's order of December 21, 1993. On January 24, 1994, the Fourth Circuit Court of Appeals ordered that the two appeals be consolidated for purposes of briefing and oral argument. Jurisdiction over these appeals was based upon 28 U.S.C. §1291.

On July 25, 1994, a Fourth Circuit panel issued its unpublished per curiam Opinion on the appeal. Although the panel amended the District Court's disposition of the case to reflect a dismissal without prejudice, the panel affirmed the District Court's denial of Brown's claim for injunctive relief. The panel's decision did not address - in fact, did not even mention - the statutory limitations on the RTC's authority under 12 U.S.C. §1441a(f) and the relationship between that statute and the anti-injunction provisions of 12 U.S.C. §1821(j). Instead, the panel held that the RTC's transfer of the disputed assets was "within its statutory authority," citing 12 U.S.C. §1821(d)(2)(B), (E), (G)(i)(II), although the panel found that the exclusion of Brown from bidding on those assets may have been "erroneous." Slip Op. at 6. The panel's decision wholly failed to address Brown's Constitutional claims as well.[4]

On August 5, 1994, Brown filed with the Fourth Circuit a petition for rehearing and a suggestion for rehearing en banc. In the petition, Brown asked the Fourth Circuit to answer the central issues presented on appeal: whether federal courts have the power to enjoin the RTC from violating specific statutory limitations on its powers as provided in 12 U.S.C. §1441a(f), where such violations have resulted in the deprivation of a citizen's Constitutional and contractual rights. Both the petition and suggestion were denied without opinion on August 19, 1994.

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[4] Brown invested over $20 million in the Properties which was lost when the RTC refused to allow Brown to bid on the note. Brown alleged that the RTC's actions violated the Fifth Amendment and deprived him of his reasonable investment-backed expectations.

REASONS FOR ALLOWING THE WRIT

I. Introduction

The practical effect of the Fourth Circuit's decision is to allow the RTC's general power to transfer assets to immunize it from the federal courts' injunctive powers, even where the RTC has exceeded explicit limitations on its authority imposed by Congress in the FIRREA and in the process has violated the Constitutional rights of United States citizens. The reasons for allowing this writ are two-fold. First, by ignoring §1441a(f), the District Court and the Fourth Circuit defaulted upon the federal courts' traditional role of monitoring federal agencies to insure their compliance with federal statutory and Constitutional law. Thus, the exercise of this Court's power of supervision is necessary to correct the abuses of the RTC and to restore the traditional oversight role of the lower federal courts.

Second, to Brown's knowledge, no federal court has addressed the precise questions presented in this writ; thus, this is a case of first impression with exceptionally important statutory and Constitutional dimensions. The RTC agrees that this case presents questions of exceptional importance, so much so that it moved the Fourth Circuit to publish the panel's decision.[5] The scope of the RTC's authority under §1441a(f) and the power of the federal courts to enforce Congressional mandates and the rights provided to citizens under the Constitution clearly present questions

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[5] The Fourth Circuit denied the RTC's motion to publish its decision in an order filed on October 7, 1994.

of exceptional importance which this Court should settle. For this reason as well, Brown respectfully requests that this Court allow the writ.

II. The RTC's Regulations And Actions Clearly Exceed The Express Limitations Imposed On The RTC's Authority By Congress

In creating the RTC, Congress enumerated the RTC's duties, including:

> To conduct the operations of the Corporation in a manner which -
>
> > (i) maximizes the net present value return from the sale or other disposition of institution [under RTC control] or the assets of such institutions;...
> >
> > (iv) minimizes the amount of any loss realized in the resolution of cases.

12 U.S.C. §1441a(b)(3)(C). Congress, in other words, wanted to get the most money the market would bear for the assets of failed institutions. Nothing in the FIRREA empowers or encourages the RTC to punish the debtors of failed institutions. On the contrary, Congress explicitly directed the RTC to work with the debtors of failed institutions to settle their obligations. 12 U.S.C. §1441a(f)(2).

The enabling legislation prescribes specific limitations on the RTC's powers to sell assets. In a section entitled "Limitations on certain Corporation activities," the statute sets forth four classes of prospective bidders who are prohibited from purchasing the assets of a failed institution. 12 U.S.C. §1441a(f) (1). The rest of the world is entitled to bid on these assets and the RTC is without authority to exclude them. Two of the four subsections, (B) and (C), deal with the officers, directors or insiders of the failed institution and are not relevant to the present case. The other two subsections, (A) and (D), deal with debtors who have defaulted on obligations to the failed institution.

Subsection (A) excludes a prospective bidder who:

> (i) has defaulted, or was a member of a partnership or an officer or director of a corporation which has defaulted, on 1 or more obligations the aggregate amount of which exceed $1,000,000 to such failed institution;
>
> (ii) has been found to have engaged in fraudulent activity in connection with any obligation referred to in clause (i); and

> (iii) proposes to purchase any such asset in whole or in part through the use of the proceeds of a loan or advance of credit from the Corporation pursuant to paragraph (3)(A).

12 U.S.C. §1441a(f)(1)(A). The criteria are in the conjunctive, and thus, all three must be met in order to exclude a prospective bidder under subsection (A). Sub-subsections (ii) and (iii) do not apply to Brown because he has never been found guilty of fraud (or even alleged to have committed fraud) and because Brown did not propose to buy the Properties with the assets of another RTC-controlled institution. Accordingly, Subsection (A) does not apply to Brown.

The fourth subsection, (D), excludes a prospective bidder who:

> (D) has demonstrated a pattern or practice of defalcation regarding obligations to such failed institution.

(Emphasis supplied). The RTC asserts that this provision applies to Brown and supports its decision to exclude Brown from bidding. However, Nattchase had only one obligation from Southmark, San Jacinto and/or Sajacito. Hence, although subsection (D) plainly requires multiple obligations, the "pattern or practice of defalcation" as interpreted by the RTC must relate solely to the note secured by

the Properties. In excluding Brown, the RTC has defined a "pattern" or "practice" of defalcation under 12 U.S.C. §1441a(f) to mean two or more missed payments on a single loan or obligation. In short, as will be seen below, the RTC took it upon itself to create a fifth class of prohibited purchasers and to thereby punish an enormous class of prospective bidders that Congress expressly directed could not be prohibited from purchasing assets.

To deem two or more late payments on a single loan to constitute a "pattern" or "practice" of "defalcation" is ridiculous. In Brown's case, payments were missed for the same core reasons: Southmark, San Jacinto and/or Sajacito's fraudulent actions and the commercial real estate recession. This subsection was obviously intended to bar debtors who default on multiple loans as part of a scheme to "pyramid" new assets out of old debts (often referred to as "milking" properties). By contrast, Brown was singularly focused on the Properties and spent over $20 million to develop them.

The RTC's usurpation of power from Congress has its roots in the term "default." Congress clearly and unambiguously defined "default":

> The term "default" means a failure to comply with the terms of a loan or other obligation to such an extent that the property securing the obligation is foreclosed upon.

12 U.S.C. §1441a(f)(2)(B)(i).[6] Therefore, an obligation, or loan, must have been foreclosed upon in order for a default to exist under §1441a(f). Under the FIRREA, as written by Congress, a debtor can have only one "default" per loan because a loan can be foreclosed only once, and multiple foreclosures are required to establish a pattern or practice of defalcation.

The RTC, however, ignored Congress' definition of default and simply declared its own definition:

> "[D]efault" means a delinquency of 90 or more days as to payment of principal or interest....

12 C.F.R. §1620.4(g). Thus, "default" has been completely divorced from the "foreclosure" requirement and has become merely a function of time and missed payments. Accordingly, under the FIRREA, as re-written by the RTC, a debtor can be guilty of an infinite number of "defaults" on a single loan because the foreclosure requirement has been deleted by RTC fiat.

The RTC's reconstruction of "default" contradicts 12 U.S.C. §§1441a(f)(1)(A) and (D) and must be rejected. Chevron, U.S.A., Inc., v. Natural Resources Defense Counsel, Inc., 104 S.Ct. 2778, 2781 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the

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[6] Sub-subsection (B)(i) explicitly provides that its definition of "default" shall be applied to the rest of 12 U.S.C. §1441a(f).

court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). Pursuant to subsection (D), Congress authorized the RTC to exclude a prospective bidder that "demonstrated a pattern or practice of defalcation regarding obligations...." Application of Congress' definition of "default" to its requirement of a pattern or practice of defalcation regarding multiple obligations unambiguously requires at least two separate obligations secured by two separate properties as to which there have been two separate foreclosures. The RTC's regulations arbitrarily expand subsection (D) to exclude a new, unintended class of bidders: anyone who, regardless of the circumstances, "defaulted on more than one obligation to pay principal or interest...." 12 C.F.R. §1620.4(f)(1).[7]

The RTC's interpretation of subsection (D) also violates the most fundamental rules of statutory construction. Subsection (A) was obviously intended to address a debtor who has defaulted on at least one loan to the same failed institution. In that event, the debtor may be excluded as a prospective bidder if and only if his default exceeds $1,000,000, he has been found guilty of fraud, and he plans

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[7] It should be emphasized that the RTC redefined "obligation" as well. The term "obligation" as used by Congress refers to the underlying note or other instrument of indebtedness. Thus, under Congress' definition of "default," obligations that have been foreclosed upon are the only debtor failures that rise to the level of "default." 12 U.S.C. §1441a(f)(2)(B)(i). However, as the statutory definition has been warped by the RTC's regulations, "obligation" means only the payment of principal or interest. Therefore, defaults can arise merely from a breach of an "obligation to pay principal or interest." 12 C.F.R. §1620.4(f)(1). In this way, the RTC circumvents the statutory foreclosure requirement.

to use RTC assets to purchase other RTC assets. If, as the RTC contends, a pattern of defalcation is established under subsection (D) by just two or more missed payments totaling $50,000 on a single loan, then subsection (A) is swallowed whole by subsection (D) and rendered utterly meaningless.

Under the most basic rules of statutory construction, statutory provisions must be read harmoniously. In re Kitchin Equipment Co. of Virginia, Inc., 960 F.2d 1242, 1247 (4th Cir. 1992) (It is an axiom of statutory construction that courts are obliged to give effect to every word used by the legislature). Thus, any construction of a provision that would render another provision meaningless must be rejected. For this reason, the RTC's interpretation of Subsection (D) is erroneous on its face. See also, Scott v. Jones, 964 F.2d 314, 317 (4th Cir. 1992) (Court will not defer to agency interpretation that defeats an express Congressional command); Adams v. Dole, 927 F.2d 771, 774 (4th Cir. 1991) (The judiciary is the final authority on issues of statutory construction and will reject agency interpretations which are contrary to the clear congressional intent).

Congress consciously chose not to automatically exclude a prospective bidder who may have missed payments on a single loan without such other proof of untrustworthiness as a finding of fraud. On the other hand, a pattern of defalcation may exist where a debtor has defaulted on multiple unrelated loans. This is not only sound statutory construction; it is plain common sense.

Further, the authority granted to the RTC under 12 U.S.C. §1441a(f)(1) is limited to prohibiting "the sale of assets of a failed institution" to persons who have demonstrated a pattern of defalcation "regarding obligations to such failed institutions." Brown, however, was excluded from bidding on a "package" of assets which contained two notes that were unrelated to the note secured by the Properties owned by Nattchase. The RTC obviously lacked the authority to exclude Brown from bidding on the two unrelated notes, even assuming arguendo that the RTC's interpretation of a "pattern of defalcation" is correct. The conclusion is inescapable that the RTC has consciously targeted Brown for arbitrary and illegal exclusion.

The FIRREA is remedial, not punitive. The RTC's primary purpose is thus to get the most money the market will bear for the assets of a failed institution. 12 U.S.C. §1441a(b)(3)(C). It is a matter of public record that the commercial real estate market was depressed during the late 1980's when FIRREA was enacted and that many commercial real estate developers were experiencing serious financial problems resulting in missed payments. If Congress had intended to exclude this group from the pool of bidders on RTC-controlled assets, Congress would have done so by simply broadening the statutory classes of barred bidders. But, this would have been contrary to the stated purposes of FIRREA. Congress recognized that only proven frauds should be excluded because to do otherwise would unnecessarily punish a significant sector of the commercial real estate economy and necessarily limit the potential return on RTC-controlled assets.

Finally, common sense dictates that Brown, with an investment of over $20 million in the underlying real estate, would make a highly competitive bid for the asset the RTC sought to sell. Besides excluding Brown, the RTC's illegal regulations will exclude untold numbers of prospective bidders for assets worth billions of dollars that remain to be sold by the RTC. The RTC has not only deprived Brown of his rights, it will also undoubtedly deprive the United States of millions of dollars in revenues that would have been realized by allowing commercial developers such as Brown to bid. The RTC should be stopped now.

III. The Power Of The Federal Courts To Enjoin The RTC From Acting Outside The Scope Of Its Statutory Authority Or In Violation Of The Constitution Is Not Limited By 12 U.S.C. §1821(j)

It is well settled that federal courts have the power to restrain the RTC where it is clearly acting beyond the scope of its statutory authority or in violation of the Constitution. National Trust For Historic Preservation v. Federal Deposit Insurance Corp., 995 F.2d 238, 240 (D.C. Cir. 1993), reinstated on reh'g, 21 F.3d 469 (D.C. Cir. 1994); Gross v. Bell Savings Bank, 974 F.2d 403, 407 (3d Cir. 1992); Ward v. Resolution Trust Corporation, 996 F.2d 99, 102 (5th Cir. 1993). Moreover, the anti-injunction provision, 12 U.S.C. §1821(j), does not prohibit a federal court from deciding whether a particular act is within the power of the RTC. See Cummings Properties Management v. Federal Deposit Insurance Corp., 786 F.Supp. 144, 145-46 (D.Mass. 1992) ("Section 1821(j) does not elevate the FDIC to the position of a sacred cow which may graze

upon the rights of others at will, unchecked by the courts"). Clearly, therefore, the lower courts were empowered to determine whether the RTC exceeded the scope of its authority under 12 U.S.C. §1441a(f) by excluding Brown from bidding, without regard to 12 U.S.C. §1821(j).

The RTC contended that 12 U.S.C. §1821(j) precluded the equitable relief sought in this case, arguing that Brown challenged the RTC's asset transfer powers. See 12 U.S.C. §1821(d)(2)(B), (E), (G)(i)(II). The Fourth Circuit apparently agreed with the RTC and held that the power to transfer assets was within the authority of the RTC. Slip Op. 6. On this basis, the Fourth Circuit denied Brown's claim for injunctive relief. The Fourth Circuit ignored the fact that Brown has never challenged the RTC's power to transfer assets. Instead, Brown claimed that the RTC acted beyond its enumerated powers to exclude bidders under §1441a(f), a section entitled "Limitations on certain Corporate activities." This is the power that Brown challenges, a power which Congress circumscribed with surgical precision. The Fourth Circuit simply failed to address the precise question presented: whether the RTC violated §1441a(f).[8]

Various courts, including the Fourth Circuit, have held that the RTC has broad discretion so long as it acts "within its statutory authority." Slip Op. 6. The RTC itself has even recognized that §1821(j) does not protect it if it

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[8] Without discussing or even citing §1441a(f), the Fourth Circuit stated only, "RTC's exclusion of Brown from the bidding process constitutes, at best, an erroneous determination by RTC as to permissible bidding participants." Slip Op. 6.

acts outside its statutory authority. The RTC nonetheless argued, and the Fourth Circuit agreed, that Brown's claim is no different from cases in which the RTC was held to be acting within its authority, although none of the decided cases has dealt with violations of §1441a(f).[9] It is beyond serious dispute that the RTC in the present case acted beyond its enumerated powers to exclude bidders under §1441a(f), "Limitations on certain Corporation activities." No case has held that the anti-injunction provision immunizes the RTC from exceeding explicit limitations on its authority. On the contrary, consistent with Brown's position, every court that has considered the issue has ruled that the RTC may be enjoined from exceeding its statutory powers, as the RTC has done in the present case.

The Fourth Circuit has essentially allowed the RTC's general power to transfer assets to immunize the RTC from violating other explicit limitations on its authority. In other words, the Fourth Circuit held that the RTC's use of its asset transfer power "cures" any and all violations of law, including violations of explicit limitations on its

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[9] The court in Cummings, supra, pointed out the fallacy of the RTC's argument:

> The FDIC's position in regard to §1821(j) begs the question of whether the FDIC's statutorily-defined powers include those which the FDIC wishes to exercise in a particular case.

786 F.Supp. at 145. The Fourth Circuit conceded that the exclusion of Brown may have been "erroneous," but ignored the underlying reason for its own conclusion: by excluding Brown, the RTC exceeded its statutorily-defined powers.

authority under FIRREA itself, and even violations of the Constitution. The illogic and extremity of the RTC's position, which has now been adopted by the Fourth Circuit, was evident during argument before the District Court, in which the RTC would not (indeed, could not) dispute the conclusion that the RTC could exclude minorities from bidding and still be immune from the injunctive powers of the federal courts.[10] If the Fourth Circuit's position is sustained in Brown's case, then its logic will be sustained as well and the law will have descended a slippery logical slope.

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[10] The RTC's radical position, adopted by the Fourth Circuit, was revealed by the following colloquy with the District Court:

> Court: The broad proposition of whether or not a court may enjoin the RTC in its decision to liquidate assets clearly is not totally unfettered. For example, if the RTC were to decide that they would not permit members of a particular racial group to bid on assets ... clearly a court could enjoin that kind of a decision by the RTC, could it not?
>
> RTC: We would assert, Your Honor, the proposition that, as long as the RTC acts within its enumerated activity, the plaintiff has an alternative remedy.

Although counsel for the RTC avoided a direct answer to the question posed by the District Court, the RTC's position is crystal clear. According to the RTC, no court has the authority to enjoin the RTC even from engaging in racially discriminatory practices. Thus, the RTC claims an immunity which Congress is not empowered to bestow upon the RTC or any other government agency.

IV. Summary

There are several compelling reasons why this writ should be allowed. First, the Fourth Circuit has given the RTC a "license to kill" the rights of every citizen, including those rights provided by the Constitution. The Fourth Circuit ruled that the federal courts are without authority to correct the RTC's abuses. The petition should be allowed to restore the federal courts' supervisory powers over federal agencies.

Second, the RTC's creation of a new and unintended class of persons barred from bidding on RTC assets, in direct contravention of Congress' mandate under FIRREA, has deprived and will continue to deprive American taxpayers of untold millions of dollars in revenue that would have been realized if Congress' scheme had been faithfully carried out.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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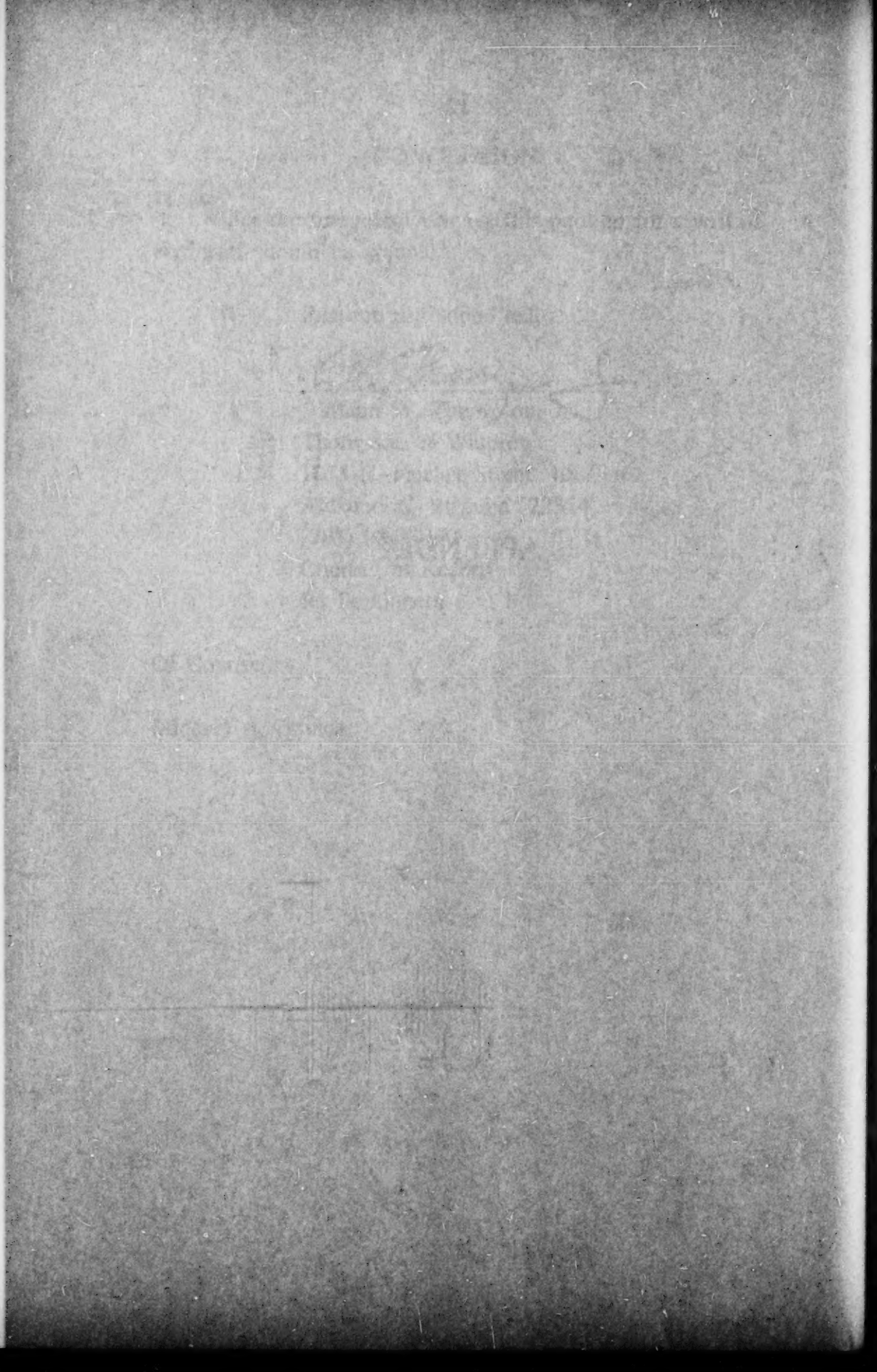
for Petitioners

Of Counsel:

Michael A. Branca

APPENDIX



APPENDIX A

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Sidney J. Brown; Saul H. Bernstein; Sidney J. Brown and Saul H. Bernstein, as the General Partners of Nattchase Associates Limited Partnership on behalf of the Limited Partners Stuart G. Brown, Frederick K. Wine, Bradley S. Bernstein and MDB Investments Limited Partnership; Nattchase Associates Limited Partnership; Mid City Redevelopment Corporation, No. 93-2597

Plaintiffs - Appellants,

v.

Resolution Trust Corporation; San Jacinto Savings Association, F.A.; Sajacito, Inc.; Southmark Corporation; CMF Loudoun, L.P., c/o Carl M. Freeman Associates, Inc.; Carl M. Freeman; Robert E. Sevila, Trustee,

Defendants - Appellees.

Sidney J. Brown; Saul H. Bernstein;
Sidney J. Brown and Saul H. Bernstein,
as the General Partners of Nattchase
Associates Limited Parntership on behalf
of the Limited Partners Stuart G. Brown,
Frederick K. Wine, Bradley S. Bernstein
and MDB Investments Limited Partnership;
Nattchase Associates Limited Partnership;
Mid City Redevelopment Corporation,

No. 94-1104

Plaintiffs - Appellants,

v.

Resolution Trust Corporation;
San Jacinto Savings Association,
F.A.; Sajacito, Inc.; Southmark
Corporation; CMF Loudoun, L.P.,
c/o Carl M. Freeman Associates, Inc.;
Carl M. Freeman; Robert E. Sevila,
Trustee,

Defendants - Appellees.

Appeals from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Loenie M. Brinkema, District Judge.
(CA-93-1450-A)
Argued: June 10, 1994
Decided: July 25, 1994
Before MURNAGHAN, WILKINS and WILLIAMS,
Circuit Judges.

Affirmed as modified by unpublished per curiam opinion.

COUNSEL

ARGUED: William W. Thompson, Jr., THOMPSON & WALDRON, Alexandria, Virginia, for Appellants. P.Matthew Sutko, RESOLUTION TRUST CORPORATION, Washington, D.C.; Philip John Harvey, SHAW, PITTMAN, POTTS & TROWBRIDGE, Alexandria, Virginia, for Appellees. ON BRIEF: Michael A. Branca, THOMPSON & WALDRON, Alexandria, Virginia, for Appellants. Munsell St. Clair, RESOLUTION TRUST CORPORATION, Washington, D.C.; Theresa V. Gorski, SHAW, PITTMAN, POTTS & TROWBRIDGE, Alexandria, Virginia; Beverlee R. Peters, Lisa Erich, S. Beryl Adler, ADLER, ROSEN & PETERS, Virginia Beach, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P.36.5 and 36.6.

OPINION

PER CURIAM:

In these consolidated appeals, Sidney J. Brown[1] challenges two orders by the district court, the first denying

---

[1] This action was initiated, and this appeal is pursued, by several individuals and business entities, including Brown, Saul H. Bernstein, Nattchase Associates Limited Partnership (Nattchase), Brown and Bernstein as general partners of Nattchase on behalf of its limited partners, and Mid City Redevelopment Corporation We refer to Appellants jointly as Brown.

injunctive relief and dismissing the instant action with prejudice, and the second denying a subsequent motion to vacate or modify the dismissal order. Brown argues that his claims against Resolution Trust Corporation (RTC) should not have been dismissed, despite his failure to pursue the applicable administrative remedies as required by 12 U.S.C.A. §1821(d)(6)(A), (13)(D)(ii) (West 1989), because RTC's exclusion of Brown from the bidding process was an act which exceeded RTC's statutory authority. Brown next argues that the district court erred in concluding that he had failed to state a cognizable cause of action against either RTC or CMF Loudoun, L.P., and its principal, Carl M. Freeman (CMF). Brown's last contention challenges the denial of injunctive relief as to RTC's transfer of the promissory note in question to CMF and CMF's subsequent foreclosure thereon.

We find that Brown's failure to pursue his claims against RTC under the applicable administrative procedures bars federal jurisdiction to review those claims. We therefore affirm the dismissal of all claims against RTC, amending that disposition to reflect a dismissal without prejudice to allow pursuit of the available administrative relief. Finding no error as to the dismissal of Brown's claim against CMF, we affirm the dismissal with prejudice. Finally, we affirm the district court's denial of injunctive relief.

I.

In June 1988, Nattchase obtained a $36 million loan from the San Jacinto Savings Association. The loan was secured with a non-recourse promissory note and deed of

trust on real property located in Loudoun County, Virginia. The loan went into default in 1989. RTC was appointed receiver for San Jacinto Savings Association in December 1990. In July 1993, RTC sold the note to CMF, as part of a package of non-performing loans from failed thrifts, after an auction and bidding process between March and May 1993. CMF subsequently sought to foreclose on the deed of trust securing the note. Brown initiated this action in an attempt to halt that foreclosure.

Brown's primary complaint is that RTC improperly excluded him from bidding on the note securing the Loudoun County property, and thereby deprived him of the opportunity to recoup his investment in that property. Brown also contends that CMF was unjustly enriched through Brown's efforts. The complaint--seeking, *inter alia,* a declaratory judgment finding RTC's bidding procedures unconstitutional, rescission of the contract of sale between RTC and CMF, a judgment requiring another bidding process for the note, injunctive relief against CMF's scheduled foreclosure, and related damages--was dismissed with prejudice.

In considering Brown's various challenges to the dismissal of his complaint, we turn first to his claims against RTC.

II.

The Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) provides that, "[e]xcept as otherwise provided in this subsection, no court shall

have jurisdiction over . . .(ii) any claim relating to any act or omission of such institution or the Corporation as receiver." 12 U.S.C.A. §1821(d)(13)(D); *see also* 12 U.S.C.A. §1821(d)(6)(A) (de novo judicial review permitted only after exhaustion of available administrative procedures). This court, like most other circuit courts,[2] has determined that claimants must submit their claims against RTC to the administrative claims process established by FIRREA before seeking judicial review. *Brady Dev. Co. v. RTC,* 14 F.3d 998, 1003 (4th Cir. 1994) ("Congress sought to ensure that *all* claims undergo the administrative claims process and are under the exclusive control of the RTC.") (emphasis added). This exhaustion requirement applies to claims arising both before and after RTC's appointment as receiver, *Rosa v. RTC,* 938 F.2d 383, 392-93 (3d Cir.), *cert. denied,* 112 S.Ct. 582 (1991), and to declaratory judgment actions. *See Henderson v. Bank of New England,* 986 F.2d 319, 321 (9th Cir.) (§1821(d)(13)(D) "bars judicial review of any non-exhausted claim, *exhausted or nonmonetary,* which is 'susceptible of resolution through the claims procedure'")(quoting *Rosa,* 938 F.2d at 394) (emphasis added),

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[2] *See, e.g., Heno v. FDIC,* 20 F.3d 1204, 1206-07 (1st Cir. 1994); *Bueford v. RTC,* 991 F.2d 481, 484 (8th Cir. 1993); *Henderson v. Bank of New England,* 986 F.2d 319, 321 (9th Cir.), *cert. denied,* 114 S.Ct. 559 (1993); *Office & Professional Employees Int'l Union, Local 2 v. FDIC,* 962 F.2d 63, 66 (D.C.Cir. 1992); *Meliezer v. RTC,* 952 F.2d 879, 882 (5th Cir. 1992); *RTC v. Elman,* 949 F.2d 624, 627 (2d Cir. 1991); *RTC v. Mustang Partners,* 946 F.2d 103, 106 (10th Cir. 1991); *FDIC v. Shain, Schaffer & Rafanello,* 944 F.2d 129, 136 (3d Cir. 1991); *see also Coit Independence Joint Venture v. Federal Sav. & Loan Ins. Corp.,* 489 U.S. 561, 579 (1989) ("[E]xhaustion of administrative remedies is required where Congress imposes an exhaustion requirement by statute.").

cert. denied, 114 S.Ct. 559 (1993); *Feise v. RTC,* 815 F.-Supp. 344, 347 (E.D.Cal. 1993) (declaratory judgment claims barred by §1821(d)(13)(D)).

Brown erroneously argues that, because RTC acted outside its statutory authority in excluding him from the bidding process, FIRREA's administrative process is inapplicable to his claims. To the contrary, RTC's transfer of the assets of the failed San Jacinto Savings Association to CMF was clearly an act within its statutory authority. 12 U.S.C.A. §1821(d)(2)(B), (E), (G)(i)(II) (West 1989 & Supp. 1994). RTC's exclusion of Brown from the bidding process constitutes, at best, an erroneous determination by RTC as to permissible bidding participants. "[E]ven if the RTC improperly or unlawfully exercised an authorized power or function, it clearly did not engage in an activity outside its statutory powers." *Ward v. RTC,* 996 F.2d 99, 103 (5th Cir. 1993). Hence, Brown must first pursue his claims under FIRREA's administrative scheme.

Brown also argues that resort to the administrative scheme would be futile, as purportedly evidenced by RTC letters responding to Brown's inquiries after transfer of the note to CMF.[3] This argument is similarly without merit,

---

[3] The first letter to RTC, dated September 8, 1993, and characterized by Brown as a flat refusal to consider Brown's claims, read in pertinent part:

> While I understand you may be disheartened by the demands of the new owner and holder of your loan, I fail to see any action which can or will be taken, or on behalf of the RTC in this regard. Please allow this to confirm that the RTC cannot, and will not honor

because judicially-created futility exceptions cannot supplant statutorily-promulgated exhaustion requirements. *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975); *FDIC v. Shain, Schaffer & Rafanello*, 944 F.2d 129, 136 (3d Cir. 1991). Moreover, the letters relied upon by Brown are "not necessarily conclusive of the receiver's determination of [Brown's] claims" since "[i]f RTC as receiver were to allow and satisfy [Brown's] claims in whole or in part, the dispute now before this court would be moot to that extent." *Rosa*, 938 F.2d at 395. There is no plausible basis for the futility exception absent "'a hard and fast position [by RTC] that [makes] an adverse ruling a certainty,'" because "[t]o excuse exhaustion based on an 'unsupported allegation of futility would allow the futility exception to swallow the exhaustion rule.'" *Darby v. Kemp*, 957 F.2d 145, 148 (4th Cir. 1992) (quoting *Thetford Properties IV Ltd. v. United States Dep't of Housing & Urban Dev.*, 907 F.2d 445, 450 (4th Cir. 1990)), *reversed on other grounds*,

---

> your request to set aside the sale and re-advertise the package, allowing NALP [i.e., Nattchase] to bid. Any further issues which you wish to raise relative to the Loan should be raised with the new owner and holder of the same, as the RTC (as conservator, receiver or otherwise) no longer maintains any right, title or interest in the Loan.

(J.A. at 83-84.) Brown contends that the second letter from RTC, actually a series of letters to him, Bernstein, Nattchase, and Mid City, dated November 29, 1993, with enclosed proof-of-claim forms, contemplates only monetary claims against failed institutions and not claims against RTC itself. However, the letters actually concern any claims "for payment from, or . . . determination[s] of rights with respect to the assets of a failed institution, or . . . claim[s] relating to any act or omission of a failed institution . . . ." (J.A. at 86, 87, 88, 89.)

113 S.Ct. 2539 (1993). Contrary to Brown's argument, resort to the FIRREA administrative scheme is not futile.

For these reasons, we find that the district court properly dismissed Brown's claims against RTC, pending presentation of his claims to RTC under the statutory administrative procedures. However, consistent with RTC's concession, we modify that disposition to reflect a dismissal without prejudice of Brown's claims against RTC, so that Brown may indeed pursue his claims according to that statutory scheme.[4] *See* 28 U.S.C. §2106 (1988).

III.

Our determination that Brown must first utilize FIRREA's administrative scheme with regard to his claims against RTC does not preclude *de novo* review of the district court's Fed.R.Civ.P. 12(b)(6) dismissal with prejudice of Brown's unjust enrichment claim against CMF. *See Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 217 (4th Cir.1994) (standard of review).

Under Virginia law, the applicable state law in this case, unjust enrichment requires proof that the plaintiff conferred a benefit on the defendant, which was requested and accepted by the defendant under circumstances that reasonably notified him that the plaintiff expected compensation from the defendant. *Raymond, Colesar, Glaspy &*

---

[4] Given this disposition, we dismiss as moot RTC's motion to dismiss the appeal for failure to exhaust the statutory administrative procedures.

Huss v. Allied Capital Corp., 961 F.2d 489, 491 (4th Cir. 1992); *Kern v. Freed, Co.*, 299 S.E.2d 363, 365 (Va. 1983). Brown has not alleged, and there is no support in the record, that he conferred any benefit on CMF, or that CMF requested or received any benefit from Brown. CMF merely purchased a promissory note from RTC on which Nattchase is liable. Because no relief can be granted to Brown under any set of facts that could be proven consistent with the allegations in this complaint, the district court properly dismissed that cause of action with prejudice, and we affirm that disposition. *Revene v. Charles County Comm'rs,* 882 F.2d 870, 872 (4th Cir. 1989).

IV.

We also find that the district court did not abuse its discretion in denying Brown's requested injunctive relief. *See Rum Creek Coal Sales, Inc. v. Caperton,* 926 F.2d 353, 358 (4th Cir. 1991) (standard of review).

Brown's first requested injunctive relief, rescission of the contract of sale between RTC and CMF for the note, is expressly barred by 12 U.S.C.A. §1821(j) (West 1989): "Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver." *See In re Landmark Land Co.*, 973 F.2d 283, 290 (4th Cir. 1992) ("The comprehensive scheme of FIRREA indicates Congress' intent to allow the RTC full rein to exercise its statutory authority without injunctive restraints imposed by bankruptcy courts or district courts in other

proceedings."). We joint the First, Second, Fifth, Sixth, and District of Columbia Circuits in holding that §1821(j) forbids equitable rescission, as sought by Brown in this case.[5] The district court, therefore, properly denied Brown's motion for injunctive relief against RTC.

Brown also sought a temporary restraining order against CMF, enjoining its imminent foreclosure on the note purchased from RTC. As demonstrated by our discussion in Part III, there is no cognizable unfair enrichment cause of action in this case, thereby precluding any basis for injunctive relief against the scheduled foreclosure. Hence, the district court also properly denied the requested temporary restraining order against CMF.

V.

Finally, the district court did not abuse its discretion in its subsequent denial of Brown's Fed.R.Civ.P. 60(b) motion, seeking vacatur of the district court's order denying injunctive relief and dismissing his complaint. *United States v. Williams,* 674 F.2d 310, 312 (4th Cir. 1982) (standard of review). According to Brown's motion, vacatur was necessary due to various alleged mistakes of law in the dismissal order. Our review of that motion reveals that it

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[5] *National Trust for Historic Preservation v. FDIC,* 21 F.3d 469 (D.C. Cir. 1994), *reinstating* 995 F.2d 238, 239 (D.C. Cir. 1993); *Heno,* 20 F.3d at 1208 n.8; *Ward,* 996 F.2d at 104; *United Liberty Life Insurance Co. v. Ryan,* 985 F.2d 1320, 1329 (6th Cir. 1993); *Harkness Apt. Owners Corp. v. FDIC,* No. 87 Civ. 7080, 1993 U.S. Dist. LEXIS 5452, at *8-9 (S.D.N.Y. Apr. 26, 1993), *aff'd without op.,* 999 F.2d 538 (2d Cir. 1993).

is "nothing more than a request that the district court change its mind," which "is not authorized by Rule 60(b)." *Williams,* 674 F.2d at 313; *see also Smith v. Evans,* 853 F.2d 155, 158 (3d Cir. 1988) (legal error, without more, cannot justify granting a Rule 60(b) motion). Moreover, as we have concluded, the order was not erroneous. Hence, Brown's Rule 60(b) motion was properly denied.

VI.

For the reasons stated herein, we affirm the district court's dismissal with prejudice of Brown's claim against CMF, and its denial of injunctive relief. We modify the dismissal of Brown's claims against RTC to reflect a dismissal without prejudice, and affirm that disposition. Finally, we affirm the district court's denial of Brown's Rule 60(b) motion.

AFFIRMED AS MODIFIED

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed
August 19, 1994

No. 93-2597
CA-93-1450-A

SIDNEY J. BROWN; SAUL H. BERNSTEIN; SIDNEY J. BROWN AND SAUL H. BERNSTEIN, as the General Partners of Nattchase Associates Limited Parntership on behalf of the Limited Partners Stuart G. Brown, Frederick K. Wine, Bradley S. Bernstein and MDB Investments Limited Partnership; NATTCHASE ASSOCIATES LIMITED PARTNERSHIP; MID CITY REDEVELOPEMNT CORPORATION

Plaintiffs - Appellants

v.

RESOLUTION TRUST CORPORATION; SAN JACINTO SAVINGS ASSOCIATION, F.A.; SAJACITO, INC.; SOUTHMARK CORPORATION; CMF LOUDOUN, L.P., c/o Carl M. Freeman Associates, Inc.; CARL M. FREEMAN; ROBERT E. SEVILA, Trustee

Defendants - Appellees

No. 94-1104
CA-93-1450-A

SIDNEY J. BROWN; et al.

Plaintiffs - Appellants

v.

RESOLUTION TRUST CORPORATION; et al.

Defendants - Appellees

- - - - - - - - - - -

On Petition for Rehearing with Suggestion for Rehearing In Banc

- - - - - - - - - - -

This appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Bert Montague
CLERK

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

SIDNEY J. BROWN, et al., Plaintiffs,	)	
v.	)	Civ.A.No. 93-1450-A
RESOLUTION TRUST CORPORATION, et al., Defendants.	)	

ORDER

For the reasons stated in open court, Plaintiffs' Petition and Motion for a Temporary Restraining Order and Preliminary Injunction is DENIED.

The Court construes the response of defendant Resolution Trust Corporation as a Motion to Dismiss Plaintiffs' Complaint. Because the Court finds as a matter of law that there is no basis in law upon which plaintiff could prevail against any of the defendants, it is further

ORDERED that this action is DISMISSED with prejudice.

Entered this 19th day of November, 1993.

Leonie M. Brinkema
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

SIDNEY J. BROWN, et al., Plaintiffs,	)	
v.	)	Civ.A.No. 93-1450-A
RESOLUTION TRUST CORPORATION, et al., Defendants.	)	

ORDER

For the reasons stated in open court, Plaintiffs' Motion to Vacate or Modify Order is DENIED.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 21st day of December, 1993.

Leonie M. Brinkema
United States District Judge

Alexandria

APPENDIX E

12 U.S.C. §1441a(f)

(f) **Limitation on certain corporation activities.** (1) Certain sales prohibited. The Corporation shall prescribe regulations to prohibit the sale of assets of a failed institution by the Corporation to any person who -

(A)(i) has defaulted, or was a member of a partnership or an officer or director of a corporation which has defaulted, on 1 or more obligations the aggregate amount of which exceed $1,000,000 to such failed institution;

(ii) has been found to have engaged in fraudulent activity in connection with any obligation referred to in clause (i); and

(iii) proposes to purchase any such asset in whole or in part through the use of the proceeds of a loan or advance of credit from the Corporation or from any institution subject to the jurisdiction of the Corporation pursuant to paragraph (3)(A);

(B) participated, as an officer or director of such failed institution or of any affiliate of such institution, in a material way in transactions that resulted in a substantial loss to such failed institution;

(C) has been removed from, or prohibited from participating in the affairs of, such failed institution pursuant to any final enforcement action by an appropriate Federal banking agency; or

(D) has demonstrated a pattern or practice of defalcation regarding obligations to such failed institution.

(2) Settlement of claims; definitions. (A) Settlement of claims. Nothing in this subsection shall prohibit the Corporation from selling or otherwise transferring any asset to any person if the sale or transfer of the asset resolves or settles, or is part of the resolution or settlement, of obliga-

tions owed by the person to the failed institution or the Corporation.

(B) Definitions. For purpose of paragraph (1)-

(i) Default. The term "default" means a failure to comply with the terms of a loan or other obligation to such an extent that the property securing the obligation is foreclosed upon.

(ii) Affiliate. The term "affiliate" has the meaning given to such term in section 2(k) of the Bank Holding Company Act of 1956 [12 USCS § 1841(k)].

APPENDIX F

12 U.S.C. §1821(j)

(j) **Limitation on court action**. Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.

APPENDIX G

12 C.F.R. §1620.4

1620.4 Restrictions on the sale of assets by the RTC regardless of the method of financing.

(a) Neither the Corporation, nor a savings association that is under its conservatorship or receivership, may sell one or more assets of a savings association that was or is under the conservatorship or receivership of the RTC, to any person if the person or any key official of that person--

(1) Has participated, as an officer or director of the same savings association, or of an affiliate of that savings association, in a material way in one or more transaction(s) that resulted in an aggregate loss of more than $50,000 to that savings association, taking into account any net proceeds from the sale of collateral; or

(2) Has been removed from, or prohibited from participating in the affairs of, the savings association whose asset(s) is (are) being sold, pursuant to any final enforcement action by a Federal banking agency (defined in 12 U.S.C. 1813(q)); or

(3) Has demonstrated a pattern or practice of defalcation regarding obligations to the savings association whose asset(s) is (are) being sold.

(b) The restrictions of paragraphs (a)(1) and (a)(3) of this section shall not apply if the sale or transfer of an asset resolves or settles, or is part of the resolution or settlement of, obligations owed by the person or its key official(s) to the savings association whose assets are being sold, or to the Corporation.

(c) For purposes of paragraph (a) of this section, "affiliate" is defined as any company that controls, is controlled by, or is under common control with, another com-

pany. Control shall be defined as it is defined in 12 U.S.C. 1841(a)(2) on August 20, 1992.

(d) For purposes of paragraph (a) of this section, a "loss" is a net loss where a savings association has written off a receivable, either because it was required to do so by an examiner, auditor or regulator, or elected to write off the receivable using applicable accounting principles.

(e) For purposes of paragraph (a) of this section, an individual or entity has participated in a material way in a transaction that caused a loss to a savings association if the individual or entity:

(1) Has been found in a final determination by a court or administrative tribunal, or is alleged in a judicial or administrative action brought by the RTC or by any component of the government of the United States or of any State--

(i) To have violated any law, regulation, or order issued by a Federal banking agency, or breached or defaulted on a written agreement with a Federal banking agency, or breached a written agreement with a savings association; or

(ii) To have engaged in an unsafe or unsound practice in conducting the affairs of the savings association; or

(iii) To have breached a fiduciary duty owed to that savings association; or

(2) Is in default on a written agreement (including, but not limited to, a contract for goods or services, note, deed of trust, mortgage, loan agreement) with a savings association.

(f) For purposes of paragraph (a) of this section, a person or its key official shall have demonstrated a pattern or practice of defalcation regarding obligations to a savings association if the person or key official has engaged in any or all of the following:

(1) The person or key official has defaulted on more

than one obligation to pay principal or interest to the savings association, and the savings association or its successor has continuing legal claims based upon these defaults in an aggregate amount in excess of $50,000; or

(2) The person or key official has engaged in more than one act that was intended to cause a loss to the savings association; or

(3) The person or key official, as a borrower, entered into more than one loan agreement with the savings association, the making of which was an unsafe or unsound action of the association on the basis of facts that the borrower knew or should have known, and the borrower defaulted on the loans in the aggregate amount of $50,000 or more.

(g) For purposes of paragraphs (e) and (f) of this section, the term "default" means a delinquency of 90 or more days as to payment of principal or interest; or the failure to comply with the terms and conditions of a contract or other written agreement, other than a loan or advance.

(h) It shall be a violation of this part for any person to purchase an asset that the RTC or a savings association under its conservatorship or receivership is prohibited from selling to that person if circumstances exist that would cause any of the restrictions enumerated in paragraph (a) of this section to apply.

Supreme Court, U.S.
FILED
JAN 17 1995
OFFICE OF THE CLERK

No. 94-885

In the Supreme Court of the United States

OCTOBER TERM, 1994

SIDNEY J. BROWN, ET AL., PETITIONERS

v.

RESOLUTION TRUST CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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Resolution Trust Corporation
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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court below properly applied the anti-injunction rule of 12 U.S.C. 1821(j) to preclude judicial rescission of a sale by the Resolution Trust Corporation, as receiver, of an asset of a failed savings institution.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-885

SIDNEY J. BROWN, ET AL., PETITIONERS

v.

RESOLUTION TRUST CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is unpublished, but the decision is noted at 30 F.3d 128 (Table). The orders of the district court (Pet. App. 15-16) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1994. A petition for rehearing was denied on August 19, 1994. Pet. App. 13-14. The petition for a writ of certiorari was filed on November 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress created the Resolution Trust Corporation in part to liquidate the assets of failed savings institutions and to divide the proceeds among valid creditors in accordance with a statutory distribution scheme. See generally 12 U.S.C. 1441a(b)(3) and (b)(4)(A) (Supp. V 1993); 12 U.S.C. 1821(d)(2)(E) and (H), (d)(10), and (d)(11) (Supp. V 1993), 1821(i) (Supp. V 1993); see also H.R. Rep. No. 54, 101st Cong., 1st Sess. Pt. 1, at 304 (1989). The statutes governing the RTC include a number of provisions designed to ensure the Corporation's ability to discharge those responsibilities quickly and efficiently. In particular, 12 U.S.C. 1821(d)(2)(G)(i)(II) (Supp. V 1993) provides that, subject only to the approval of appropriate federal banking authorities, the RTC as receiver may "transfer any asset or liability of the institution in default * * * without any approval, assignment, or consent with respect to such transfer." In addition, 12 U.S.C. 1821(j) (Supp. V 1993) specifies that, except as otherwise specifically provided, "no court may take any action * * * to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver." Those challenging the RTC's actions as receiver are therefore limited to post hoc claims for monetary damages; and the courts have no jurisdiction over "any claim relating to any act or omission of * * * the Corporation as receiver," unless the claim has first been submitted for consideration under the RTC's own administrative procedures. 12 U.S.C. 1821(d)(13)(D)(ii) (Supp. V 1993); see 12 U.S.C. 1821(d)(6)(A) (Supp. V 1993).

2. In June, 1988, petitioner Nattchase Associates Limited Partnership, of which petitioners Brown and Bernstein are the general partners, borrowed $36 million

dollars from San Jacinto Savings Association, securing the loan with a non-recourse promissory note and a deed of trust on real property located in Loudoun County, Virginia. Pet. App. 3-5 & n.1. Petitioners began to default on the loan in 1989. *Id.* at 5. By March, 1993, the arrearages amounted to more than $14 million in interest alone. RTC C.A. Br. 5.

In 1990 the RTC was appointed receiver for San Jacinto. In liquidating the institution's assets, the RTC included petitioners' note and deed of trust in a pool of non-performing loans packaged together for sale. In July, 1993, the RTC sold the package to respondent CMF Loudoun, LP (CMF), after an auction and bidding process that took place between March and May, 1993. In November, 1993, CMF sought to foreclose on the deed of trust securing the note. Pet. App. 5; Pet. 5 n.3.

3. On November 19, 1993, petitioners filed suit against the RTC and CMF, alleging that the RTC had improperly excluded petitioners from bidding on the package of loans sold to CMF, and that the sale would result in unjust enrichment of CMF. See Pet. 5; Pet. App. 5. The complaint sought a judgment declaring that the RTC's bidding procedures violated the agency's governing statutes and unconstitutionally deprived petitioners of their property without due process of law, and that the sale resulted in the unjust enrichment of CMF under state law; as relief petitioners requested orders requiring a new bidding process, rescinding the sale to CMF, enjoining the scheduled foreclosure, and granting related money damages. Pet. App. 5. The district court not only denied petitioners' request for a temporary restraining order or preliminary injunction but, perceiving "no basis in law upon which plaintiff[s] could prevail against any of the defendants," dismissed the complaint. *Id.* at 15.

On December 14, 1993, petitioners moved under Fed. R. Civ. P. 60(b) to vacate or modify the district court's ruling. See Pet. 6; Pet. App. 11. The RTC agreed that petitioners' claims for damages against the RTC could be submitted to the RTC's administrative claims process, that any adverse determination should be subject to judicial review as provided in 12 U.S.C. 1821(d)(6) and (7) (Supp. V 1993), and that petitioner's monetary claims against the RTC should therefore have been dismissed without prejudice. Following a hearing, however, the district court denied petitioners' motion in its entirety. Pet. App. 16.

4. The court of appeals consolidated petitioners' appeals from the dismissal of their complaint and the denial of their motion under Rule 60(b). The court affirmed the dismissal of petitioners' monetary claims against the RTC, on the ground that petitioners had failed to exhaust the administrative claims process. Pet. App. 5-9. The court rejected (*id.* at 7) petitioners' argument that the administrative exhaustion requirement was inapplicable because the RTC "acted outside its statutory authority in excluding [them] from the bidding process"; rather, the court held that even if the RTC "improperly or unlawfully exercised an authorized power or function, it clearly did not engage in an activity outside its statutory powers." *Ibid.*, quoting *Ward* v. *RTC*, 996 F.2d 99, 103 (5th Cir. 1993). The court also rejected (Pet. App. 7-9) petitioners' contention that exhaustion would be futile. The court did, however, modify the district court's order to reflect dismissal of the monetary claims without prejudice, accepting the RTC's concession that petitioners should have the opportunity to avail themselves of the administrative scheme and of subsequent judicial review of any adverse determination. *Id.* at 9.

The court of appeals also affirmed the district court's denial of injunctive relief against the RTC (Pet. App. 10-11), holding that equitable rescission of the sale to CMF was "expressly barred" by the anti-injunction rule set forth in 12 U.S.C. 1821(j) (Supp. V 1993).

The court of appeals reviewed petitioners' unjust enrichment claim against CMF de novo. Pet. App. 9. The court concluded, however, that the complaint did not allege, and the record did not disclose, that petitioners had "conferred any benefit on CMF, or that CMF requested or received any benefit from [petitioners]." *Id.* at 10. Because "no relief [could] be granted to [petitioners] under any set of facts that could be proven consistent with the allegations in this complaint," the court affirmed the district court's dismissal of the cause of action against CMF and the denial of any order restraining CMF's foreclosure on the loan. *Id.* at 10-11. Petitioners have not sought further review of the judgment in favor of CMF.

ARGUMENT

Petitioners challenge only the court of appeals' denial of equitable relief against the RTC's sale of the Nattchase loan to CMF.[1] The court based its decision

[1] Petitioners do not challenge the court of appeals' decision dismissing their monetary claims against the RTC, without prejudice, pending exhaustion of the RTC's administrative claims procedures. See Pet. i, 8 (raising only questions related to court's injunctive powers under the statute). In any event, any such challenge would now be moot. After the district court's decision in this case, petitioners filed an administrative claim with the RTC. That claim was denied in its entirety on January 10, 1995. In accordance with the statutory claims procedure and the court of appeals' opinion, petitioners are now free either to seek further administrative review of that determination, followed if necessary by judicial review under the Administrative Procedure Act, or to

(Pet. App. 10-11) on 12 U.S.C. 1821(j) (Supp. V 1993), which directs that:

> Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.

As petitioners concede (Pet. 18), the courts of appeals have uniformly accorded the RTC broad protection under Section 1821(j) so long as it acts within its sphere of statutory authority as receiver for a failed thrift.[2] Indeed, the decision below followed five others in rejecting the sort of equitable rescission remedy that petitioners sought in this case. Pet. App. 11 & n.5.

Petitioners contend that Section 1821(j) does not apply in this case because the RTC acted outside its statutory authority when it sold the Nattchase loan to CMF in an auction in which petitioners were not allowed to

pursue the same monetary claims in a new district court proceeding. See 12 U.S.C. 1821(d)(6)-(7) (Supp. V 1993); Pet. App. 9. No further decision in this case could therefore have any effect on petitioners' ability to seek judicial resolution of their monetary claims.

[2] See, *e.g.*, *Tillman* v. *RTC*, 37 F.3d 1032 (4th Cir. 1994); *Volges* v. *RTC*, 32 F.3d 50 (2d Cir. 1994); *Carney* v. *RTC*, 19 F.3d 950, 956-958 (5th Cir. 1994); *Sweeney* v. *RTC*, 16 F.3d 1, 6 (1st Cir.), cert. denied, 115 S. Ct. 291 (1994); *Ward* v. *RTC*, 996 F.2d 99 (5th Cir. 1993); *United Liberty Life Ins. Co.* v. *Ryan*, 985 F.2d 1320, 1328-1329 (6th Cir. 1993); *Gross* v. *Bell Savings Bank, PaSA*, 974 F.2d 403, 407-408 (3d Cir. 1992); *Rosa* v. *RTC*, 938 F.2d 383, 397-400 (3d Cir.), cert. denied, 112 S. Ct. 582 (1991); see also, *e.g.*, *National Trust for Historic Preservation* v. *FDIC*, 21 F.3d 469 (D.C. Cir. 1994), reinstating in part 995 F.2d 238 (D.C. Cir. 1993), cert. denied, 115 S. Ct. 683 (1994); *Lloyd* v. *FDIC*, 22 F.3d 335, 336-337 (1st Cir. 1994).

participate. See, *e.g.*, Pet. 8, 16, 17-20. As the courts of appeals have made clear, however, the RTC cannot be considered to have acted outside the sphere of its authority for these purposes simply because it may have exercised an authorized power or function improperly in a particular case. Any such interpretation would quickly swallow the rule of Section 1821(j), because a party seeking an injunction would always allege that the agency acted improperly. Rather, the anti-injunction provision protects the RTC from being subjected to suits for injunctive relief where it takes actions that are generally within its statutory authority (here, selling assets of a failed institution, see 12 U.S.C. 1821(d)(2)(B), (E) and (G) (Supp. V 1993)), but that are challenged as violating some other legal right or obligation. See, *e.g.*, Pet. App. 7; *Volges* v. *RTC*, *supra* (asset transfer alleged to violate state contract rights); *National Trust for Historic Preservation* v. *FDIC*, *supra* (transfer alleged to violate federal historic preservation statute); *Ward*, 996 F.2d at 102-103 (alleged failure to maximize value of transferred asset); *Gross*, 974 F.2d at 407-408 (alleged ERISA and due process violations); *Rosa*, 938 F.2d at 397-398 (alleged ERISA violation); cf. *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 574-577 (1989) (construing similar wording in different statute not to prohibit judicial determination of creditors' claims against failed institution).[3]

Petitioners argue (Pet. 8-17) that the RTC acted improperly by excluding petitioners from bidding on the package that included the Nattchase loan. That argu-

[3] This Court has declined three previous invitations to consider the scope of Section 1821(j). See *National Trust for Historic Preservation* v. *FDIC*, 115 S. Ct. 683 (1994); *281-300 Joint Venture* v. *Onion*, 112 S. Ct. 933 (1992); *Rosa* v. *RTC*, 112 S. Ct. 582 (1991).

ment can be fully addressed, by the RTC and by the courts, in the course of resolving petitioners' claim against the agency for monetary damages in connection with the sale.[4] See note 1, *supra*. In this case, however, the court below correctly held that the asset sale fell within the RTC's statutory authority (Pet. App. 7), and that Section 1821(j) precluded equitable rescission of the sale. We are unaware of any holding to the contrary by this Court or any other court of appeals.

[4] Petitioners contend (Pet. 9-17) that the RTC has either misinterpreted or violated 12 U.S.C. 1441a(f) (Supp. V 1993), which requires the RTC to prohibit sales of a failed institution's assets to specified classes of persons. Neither the district court nor the court of appeals addressed that argument on the merits. Even assuming that petitioners do not fall within any of the classes defined by Section 1441a(f) and its implementing regulations, that Section does not purport to establish an exclusive or exhaustive list of prohibited buyers. A variety of other statutory provisions give the RTC broad discretion in determining how, and to whom, to dispose of assets. See, *e.g.*, 12 U.S.C. 1441a(b)(9)(D) and (b)(11)(A) (Supp. V 1993); 12 U.S.C. 1821(d)(1), (d)(2)(B), (d)(2)(C), (d)(2)(G)(i)(II), and (d)(2)(J) (Supp. V 1993).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 94-885

IN THE
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OCTOBER TERM, 1994

SIDNEY J. BROWN, *et al.*,
Petitioners,

v.

RESOLUTION TRUST CORPORATION,
Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I. INTRODUCTION

Respondent's Brief in Opposition ("Respondent's Brief") does not dispute the legal significance of this case or the grounds for review by this Court. Respondent's Brief does, however, distort material facts and mischaracterize the basis of Petitioners' (hereinafter "Brown") claims in a blatant attempt to prejudice this Court against Brown's Petition and to mask the important questions of first impression which should be reviewed and settled by this Court.

II. RESPONDENT DISTORTS THE FACTS OF THIS CASE

A. Brown Never Received A "Loan" Or Any Other Money From Respondents

On June 20, 1988, Petitioner Nattchase Associates Limited Partnership ("Nattchase") purchased from Respondent Sajacito two parcels of property (the "Properties") that Sajacito owned for a price of $45 million. Nattchase paid $9 million in cash at settlement, plus closing costs, and financed the balance of the purchase price with a $36 million deferred purchase money note and deed of trust (the "Nattchase note") provided by Sajacito, which was wholly owned by Respondent San Jacinto. Neither Sajacito or San Jacinto ever forwarded any monies to Nattchase or any of the other Petitioners. Thus, contrary to Respondent's statements in its Brief, Brown did not borrow $36 million from San Jacinto. See Respondent's Brief at 2. This distinction

is important because the underlying issue in this case is the tremendous "loss" caused by Brown's alleged "defalcation."

B. Respondents Never "Auctioned" The Nattchase Note

Next, Respondent states that, "after an auction and bidding process," Respondent RTC sold the Nattchase note to Respondent CMF Loudoun. Respondent's Brief at 3. Respondent's use of the term "auction" is patently deceptive as that term is defined as "a public sale of property to the highest bidder...." Black's Law Dictionary 119 (5th ed. 1979). If an "auction" truly had been held, this lawsuit never would have been filed. Instead, in a sealed bid sale, the RTC excluded Brown who, with an investment of over $20 million in the underlying real estate, clearly had the most incentive to make the highest bid at an auction for the note. Respondent cannot obscure the RTC's wrongful exclusion of Brown from the bidding process by claiming that an "auction" for the note was held.

III. RESPONDENT MISCHARACTERIZES THE BASIS OF BROWN'S CLAIMS

Respondent states, "Petitioners contend that Section 1821(j) [12 U.S.C. §1821(j)] does not apply in this case because the RTC acted outside its statutory authority when it sold the Nattchase loan to CMF...." Respondent's Brief at 7. This is simply a misstatement of the basis of Brown's claims. Brown does not contend that the RTC acted outside its statutory authority when it sold the Nattchase note

to CMF.[1] Instead, Brown contends that the RTC acted outside its statutory authority when it excluded Brown from bidding on the Nattchase note; that is, that the RTC acted beyond its enumerated powers to exclude bidders under 12 U.S.C. §1441a(f), a section entitled "Limitations on certain Corporate activities."[2]

Respondent's obvious ploy is to conceal the RTC's clear violation of §1441a(f) by mischaracterizing Brown's claim as a challenge to the RTC's power to transfer assets. Respondent hopes to convince this Court that this is merely another case of a party claiming that the RTC improperly exercised one of its statutory powers. Respondent, however, cannot "pigeonhole" Brown's claim within §1821(j). The RTC took actions which it had no authority to take,

---

[1] Note again Respondent's use of the term "loan" to imply that Brown was actually loaned money by Sajacito or San Jacinto. As stated above, none of the respondents ever advanced any monies to Brown.

[2] Respondent concedes that 12 U.S.C. §1821(j), the anti-injunction provision, only protects the RTC from being subjected to suits for injunctive relief where the RTC acts within its statutory authority. Respondent's Brief at 7. See Gross v. Bell Savings Bank, 974 F.2d 403, 407 (3d Cir. 1992) (Federal courts have the ability to restrain the RTC where it is acting outside its statutory powers.); Cummings Properties Management v. FDIC, 786 F.Supp. 144, 145 (D.Mass. 1992) (§1821(j) does not prevent a court from adjudicating whether a particular act is within the powers of the RTC.) Respondent asserts that several other statutory provisions give the RTC broad discretion in determining how, and to whom, to dispose of assets. Respondent's Brief at 8, n.4. Respondent's reliance on these provisions is unavailing as none of the cited provisions deal even indirectly with the RTC's authority to exclude potential bidders which, of course, §1441a(f)(1) addresses directly.

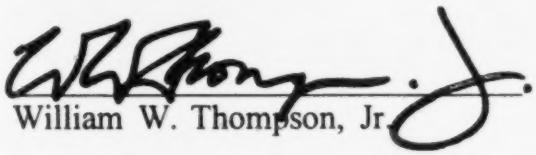
i.e., the exclusion of Brown from bidding on the Nattchase note. Consequently, §1821(j) does not apply and the District Court should have enjoined the RTC from acting outside the sphere of its statutory authority, or declared its bidding procedures and exclusion of Brown to be illegal, null and void.

This is a case of first impression involving extremely important questions of federal and Constitutional law which this Court should settle. Respondent notes that this Court has declined three previous invitations to consider the scope of §1821(j). Respondent's Brief at 8, n. 3. See National Trust for Historic Preservation v. FDIC, No. 94-317 (Dec. 12, 1994); Joint Venture v. Onion, 112 S.Ct. 933 (1992); Rosa v. RTC, 112 S.Ct. 582 (1991). This case, however, is unlike any of those in that none involved even an allegation that the RTC (or FDIC) acted outside the scope of its statutory authority. Here, Respondent concedes that §1821(j) protects the RTC from injunctive relief only where it acts within its statutory authority, and Brown has conclusively demonstrated that the RTC in fact acted outside that authority. This case thus presents this Court with an opportunity to establish a bright line which not even the RTC can cross.

IV. CONCLUSION

For the reasons set forth above and in Brown's Petition For Writ Of Certiorari, Brown respectfully requests that this Court grant his Petition.

Respectfully submitted,



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